RECENT AMERICAN DECISIONS.

Supreme Court of Indiana.

NALTNER ET AL. v. DOLAN.

Where money belonging to a client is collected for him by an attorney, and deposited in good faith in a bank of good standing, in the name of the attorney, such attorney is responsible for the loss thereof through failure of the bank, although the money was not mingled with his own funds, and although the transmission of the money collected was prevented by garnishee process soon after its deposit in bank, and before an opportunity had been presented to send it to the client.

APPEAL from Marion Superior Court.

Claypool & Ketcham, for appellants.

J. R. Courtney, for appellee.

The opinion of the court was delivered by

MITCHELL, J.—Naltner, on the 24th day of February, 1883, commenced proceedings in attachment against Dolan, and on the same day caused a summons in garnishment to be served on the appellants herein. On the 7th day of March following, upon his intervening petition, Montague was admitted as a party to the proceeding. He filed a cross-complaint, in which he alleged, in substance, that the fund in the hands of the appellants—that being the subject of the attachment and garnishee proceedings—had been assigned to him by Dolan, for a valuable consideration, before the proceedings were commenced. He prayed judgment for the recovery of the money. The appellants, with the general denial, answered specially, admitting the possession of the fund which they averred had come to their hands as the attorneys of Dolan. They alleged that they had been notified by Montague of his claim after the proceedings in garnishment had been commenced, and averred their readiness to pay the money to whomsoever the court should adjudge entitled thereto. Other answers were filed, to which demurrers were sustained. The facts were found specially by the court, and are presented in the following summary:

Dolan, who at the time the suit was commenced lived in Illinois, owed Naltner $600 then due. The appellants, as attorneys, had in their hands for collection a claim in favor of Dolan against the Indiana, Bloomington & Western Railway Company, which Dolan, on the 13th day of September 1882, transferred, for value, to Mon-

tague. On February 24th 1883, the day on which the attachment suit was commenced, appellants received from the clerk of the United States District Court for the district of Indiana, checks for something over $80,000, which was in the payment of claims against the Indiana, Bloomington & Western Railway Company; which payment was made to them in behalf of Dolan and many other of their clients. Dolan's claim against the company was $600. Upon receiving the check they deposited it with the Indiana Banking Company, which was then in good standing, the deposit being to the credit of themselves, in their firm name. The money thus received belonged to some hundreds of their clients, and the computation of interest, and the dividend to each of his share, required several days of continuous work before distribution could be made. The appellants were lawyers—partners—actively engaged in practice. They had an account at the bank in question, in which all money collected for and belonging to their various clients was deposited and checked out in the firm name; but such moneys were not mingled with their own.

Before they had time or opportunity to pay out the money in controversy, the appellants were garnished at the suit of Naltner They received notice of the assignment to Montague February 28th 1883, four days after the suit was commenced. Montague, within a few months after giving notice of his claim, and while the proceedings in garnishment were pending, made demand on the garnishee defendant for the money remaining in their hands which was derived from the Dolan claim. On the 9th day of August 1883, the Indiana Banking Company, having until that time continued in good standing and credit, failed. A receiver was appointed for the bank August 13th 1883. The appellants brought the certificate of the receiver of the bank for the money in dispute into court, and offered to surrender it to the person entitled, as the court should direct. The amount remaining in their hands, in the manner above stated, was $445.69. Conclusions of law were stated favorably to a recovery by Montague against the appellants of the amount thus remaining in their hands.

Do the facts found warrant the conclusions of law stated? Money belonging to a client, having been received by the attorneys in payment of a claim left with them for collection, the transmission of such money having been arrested by garnishee process before an opportunity for transmitting it occurred, the question is, having

acted in the utmost good faith, and without any suggestion of fault or neglect, are the attorneys responsible for the continued solvency of the bank in which such funds were deposited in their own name, but not mingled with their own funds, notwithstanding the bank was in good credit when the deposit was made? The receipt of money by an attorney, under the circumstances disclosed in this case, does not *pro facto* create the technical relation of debtor and creditor between the attorney and client. It is because it does not that a suit cannot be maintained by the latter against the former without first making a demand. Money so collected belongs to the client. The attorney occupies toward it the relation of a trustee, so long as he chooses to treat and preserve the fund as a trust fund. The circumstances under which he will be liable for its loss are precisely those which govern in the case of any other trustee. While it is preserved in its trust character, if he, exercising the same caution in respect to depositing it, if a deposit becomes necessary or proper, as a prudent man would in regard to his own money, and a loss happens, he will be excused: *Norwood* v. *Harness*, 98 Ind. 134; *McIntosh* v. *Greensdale*, 6 N. E. Rep. 926. The authorities, however, distinguish between cases in which the deposit was made in such a manner as to preserve its trust character on the books of the bank in which the fund was deposited, and those in which the owner of the fund might be put to the trouble of proving, by extraneous evidence, that the fund was not the individual money of the trustee. Whenever a trustee, unless properly authorized to do so, puts the fund in such a shape as to invest himself with a legal title to it, the *cestui que trust* has his election either to treat the fund, according to the appearance of things, as the property of the trustee, and regard the latter as his debtor, or he may demand that the title be transferred to him. If a deposit is made in such manner as, on the face of the books of the bank in which the deposit is made, to authorize the trustee, his assignee or legal representative, to claim it as the fund of the depositor, the *cestui que trust* has the option to do likewise: *Merket* v. *Smith*, 33 Kans. 66; s. c. 5 Pac. Rep. 394; *McAllister* v. *Commonwealth*, 30 Penn. St. 536; *Morris* v. *Wallace*, 3 Id. 319; *Jackson* v. *Bank*, 10 Id. 61; *School Dist.* v. *First Nat. Bank*, 102 Mass. 174; *Utica Ins. Co.* v. *Lynch*, 11 Paige 520; *Bartlett* v. *Hamilton*, 46 Me. 435; 2 Pom. Eq. Jur., § 1076; Perry on Trusts, § 443; Story on Agency, § 208.

In case it becomes the duty of an agent or trustee to deposit money belonging to his principal, he can escape the risk only by making the deposit in his principal's name, or by so distinguishing it on the books of the bank as to indicate, in some way, that it is the principal's money. If he deposit in his own name, he will not, in case of loss, be permitted to throw such loss on his principal: *Williams* v. *Williams*, 55 Wis. 300; s. c. 12 N. W. Rep. 465; and 13 N. W. Rep. 274; *Norris* v. *Hero*, 22 La. Ann. 605; *Mason* v. *Whitthorne*, 2 Cold. 242; *Jenkins* v. *Walter*, 8 Gill & J. 218; *Robinson* v. *Ward*, 2 Car. & P. 60; *Macdonnell* v. *Harding*, 7 Sim. 178; *McIntosh* v. *Greensdale*, *supra*. In such a case the good faith or intention of the trustee is in no way involved. Having, for his personal convenience, or from whatever motive, deposited the money in his own name, thereby vesting himself with a legal title, it follows, as a necessary consequence, when loss occurs, he will not be permitted to say as against his *cestui que trust*, that the fact is not as he voluntarily made it appear.

What the legal or equitable rights of the real owner of the fund would be in such a case, as against the bank, or as against attaching creditors of the depositor, has been the subject of much discussion, and of some diversity of opinion: *Pennell* v. *Deffell*, 4 DeG., M. & G. 372; *Farmers' Bank* v. *King*, 57 Penn. St. 202; *School Dist.* v. *First Nat. Bank*, 102 Mass. 174; *Jackson* v. *Bank*, *supra*; *Bundy* v. *Town of Monticello*, 84 Ind. 131, and cases cited; *McLain* v. *Wallace*, 103 Ind. 562; s. c. 5 N. E. Rep. 911; *McComas* v. *Long*, 85 Ind. 549; *Ellicott* v. *Barnes*, 31 Kan. 170, 173; s. c. 1 Bac. Rep. 767.

Whatever diversity of opinion may be found in respect to the rights of the bank, or other creditors of the depositor, the authorities agree that a trustee who either invests or deposits trust money in his own name, without in some way designating it as trust property, will be responsible for any loss that may occur to the fund while so invested or deposited. *Gilbert* v. *Welsch*, 75 Ind. 557; 2 Lead. Cas. Eq. 1805. Having put the owner of the fund to the hazard of losing it, or of maintaining its trust character by such proof *aliunde* as may be available to him, the trustee thereby gives the former the privilege of treating the latter as his debtor, or of supplying the proof, or accepting his admission of the facts, at his option.

Applying the principles stated to the facts found. the conclusion

follows that the appellants assumed the risk that the bank in which the fund was deposited in their name, and from which it could only have been drawn by their check, would be able to respond with the money when their check for it should be presented. The fact that none but money belonging to clients was deposited to the account in which the fund in question was placed does not alter the case. The controlling consideration is that it was deposited to the credit of the firm, without anything to designate or preserve its trust character. They took and retained the legal title to the deposit in themselves. In the event of a controversy, the character of the fund would have depended wholly on extraneous proof. This being so the owner had the right to elect to stand upon the title to the deposit as he found it. Having so elected, there is no rule of law which authorizes any inquiry into the motives for so taking title, short of an express or implied direction from the owner of the fund. The judgment is affirmed with costs.

The first case on the question whether a trustee who has deposited the money of the *cestui que trust* in a bank which subsequently fails, is personally liable therefor, was *Knight* v. *Lord Plimouth*, 3 Atkyns 480; s. c. 1 Dickens 120, decided by Lord Ch. HARDWICKE in 1747. It was there held that "where a receiver pays money to a tradesman, and takes bills for the sum, if he was in credit at the time, though he fails soon after, it shall not affect the receiver." It does not appear from the report of this case whether the deposit was made individually, or as receiver.

In *Wren* v. *Kirton*, 11 Ves. Jr. 377, Lord Ch. ELDON said: "In *Knight* v. *Lord Plymouth*, I apprehend the deposit with the country banker was to the account of the receiver, *as receiver;* not to his individual account;" and subsequently, in the same case, he says: "I should not much fear to contradict the case of *Knight* v. *Lord Plimouth*, upon what has been done by later authorities, if it is as represented, for nothing is more dangerous * * * * * if he goes to a responsible banker, and gets a bill upon a responsible house in London in his favor as receiver, that bill so earmarked would be specific assets to the credit of the trust property." So, in this case, he held the "receiver charged with a loss by the failure of the banker; having made the remittance to his own credit and use, and not to a specific account for the trust." The same rule was followed by Lord Ch. BROUGHAM, in *Salway* v. *Salway*, 2 Russ. & Myl. 215, subsequently affirmed by the House of Lords, in 2 Russ. & Myl. 757. See *White* v. *Baugh*, 3 C. & F. 44. In *Williams* v. *Williams*, 55 Wis. 300, CASSODY, J., said: "It is true that *Knight* v. *Lord Plimouth*, has frequently been referred to in other cases without much discrimination: *Rowth* v. *Howell*, 3 Ves. Jr. 566; *Lovell* v. *Minot*, 20 Pick. 119; *United States* v. *Thomas*, 15 Wall. 343; *Seawell* v. *Greenway*, 22 Tex. 697; but the distinction thus made by Lords ELDON and BROUGHAM seems to be well supported by authority." See *Massey* v. *Banner*, 4 Madd. 413; *Tebvs* v. *Carpenter*, 1 Madd. 290; *Mathews* v. *Brise*, 6 Beav. 239. In *Massay* v. *Banner*, 1 Jacob & W. 248, Lord ELDON said: "If an assignee pays money into his bank-

er's hands as money belonging to the estate, and the banker fails, the assignee is undoubtedly clear from the loss; but if, instead of distinguishing it, he pays it all into his own account, then it is his account there; there is nothing like a declaration of trust, and it is familiar to consider him as having it in the banker's hands for himself, making him liable for it, &c.:" *Pennell* v. *Duffell*, 4 DeG., M. & G. 386, 392; *School Dist.* v. *First Nat. Bank*, 102 Mass. 174; *Mason* v. *Whitthorne*, 2 Cold. 242.

In *Robinson* v. *Ward*, 2 C. & P. 60, ABBOTT, C. J. (Lord TENTERDEN), said: "The defendant should have paid the money into a banker's hands by opening a new account in his own name 'for the credit of Robinson's estate, and so earmarked the money as belonging to that estate; then it would have been kept separate." See also *Macdonnell* v. *Harding*, 7 Sim. 178; *Hammon* v. *Cottle*, 6 S. & R. 290; *Cartwell* v. *Allard*, 7 Bush 482; *Bartlett* v. *Hamilton*, 46 Me. 435.

In *Commonwealth* v. *McAllister*, 28 Penn. St. 480; s. c. 30 Id. 536, PORTER, J., said, "If he (the trustee) undertakes to make a deposit in a banking institution, the entry must go down on the books of the institution, that they are the funds of the specific trust to which they belong. He cannot so enter them as to have them his own to day, if they are good, and to-morrow, if bad, ascribe them to the estate, or shift them in an emergency from one estate to another; or by the deposit, secure the discount of his own note, and have the deposit snatched at by the bank, if the note be not paid, or attached by a creditor, as the depositor's individual property. No matter what he inteuds to do, or what the cashier or clerk may think he is doing, the deposit must wear the impress of the trust, or he cannot, when brought to account, call it trust property." See *Baskins* v. *Baskins*, 4 Lans. 90. In *Jenkins* v. *Walter*, 8 Gill & J. 218, "where a guardian had received a sum of money belonging to his ward, and on the day of its receipt, had deposited it in a banking institution, then in good credit, but which subsequently failed, and taken a certificate therefor, payable to himself or order, it was held that the loss resulting from the failure of the bank should fall upon him, though on the day of the deposit, by eudorsement on the certificate, he declared it to be the property of his ward and placed in bank for his benefit:" *State* v. *Greensdale*, 6 N. E. Rep. (Ind.) 926; *Slanter* v. *Favorite*, 4 Id. 880; *Norwood* v. *Harness*, 98 Ind. 134; *Marquess* v. *La Baw*, 82 Id. 550; *Sanders* v. *State*, 49 Id. 228. But see *Parsley's Adm'r.* v. *Martin*, 77 Va.

In *Sargeant* v. *Downey*, 5 N. E. Rep. 903 (Wis.), TAYLOR, J., said: "When the agent deposits in his own name the money of his principal in a bank, without an express or implied authority from the principal to do so, such deposit is a conversion of the money to the use of the agent as much as if he loaned the same to his neighbor and took his note for it. The deposit is a loan to the bank and the depositor becomes the creditor of the bank for the amount of his deposit. When, therefore, the agent deposits money of his principal to his own credit in a bank, or loans it to an individual, unless it be done with the consent of his principal, the agent takes all the risk which attends such deposit or loan." Story on Agency, sect. 208. In *Norris* v. *Hero*, 22 La. Ann. 605, it was held that "an agent who, when it becomes his duty to deposit in bank the money of his prineipal, fails to make the deposit in the name of his principal, becomes personally liable for the amount. In such case the agent will not be permitted to urge the failure of the bank after the deposit was made and throw the loss on the principal:" *Webster* v. *Pierce*, 35 Ill. 159; *Mason* v. *Whitthorne*, 2 Caldwell (Tenn.) 242; *Caffrey* v. *Darby*, 6 Ves. 496.

The test is not so much the keeping of a separate account at the bank, as it is the parting with, and hence losing, of, the identity of the trust fund, and having in place thereof no obligation, contract, or account which is impressed with the equitable ownership of the trust: *Williams* v. *Williams*, 55 Wis. 300.

CHARLES BURKE ELLIOTT.

Minneapolis, Minn.

Supreme Court of Ohio.

ARCHIBALD WOODS *v.* PAULINE V. WADDLE.

A. and P. were married in West Virginia at their domicile, where A. retained his domicile. P. went to Tennessee, and in *ex parte* proceedings there obtained a divorce *à vinculo* from A., but as there was no personal service upon A. her application for alimony was dismissed without prejudice, and to enable her to sue for it elsewhere. P. then brought suit in Ohio for alimony alone, and to reach certain property in Ohio belonging to A. In this case she obtained service upon A., who also appeared and filed pleadings in the case. On the trial the court found sufficient cause and allowed her alimony. *Held*, P. had a right thus to bring her action for alimony alone, and she could have her claim therefor determined, and, if sustained upon trial, the court could allow her reasonable alimony out of the property of A.

ERROR to the District Court of Belmont county.

Cowan & Chambers and *J. F. Kelly*, for plaintiff in error.

L. Danford, for defendant in error.

The opinion of the court was delivered by

FOLLETT, J.—It is not claimed that Pauline V. Waddle was not rightly divorced and restored to her maiden name; neither is it claimed that her right to alimony had ever been passed upon in any prior action.

It is not questioned that the amount of the alimony decreed is just and reasonable.

If she had not been divorced she was the wife of the plaintiff in error; and, if residing in Belmont county, without doubt as a wife, under Section 5702 of the Revised Statutes, she could file her petition for alimony alone. Section 5702 provides * * * "the wife may file her petition for alimony alone, or, if a petition for divorce has been filed by the husband, she may file her cross-petition for alimony, with or without a prayer for the dissolution of the marriage contract;" and "habitual drunkenness" is specified as a cause for alimony.

The old English doctrine, "that alimony has no independent existence," is not the law of Ohio.